Supreme Court, U.S.
FILED
DEC 28 2009
OFFICE OF THE CLERK

No. 09-491

In The Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA PEACE NETWORK, DIANA MANN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAROL A. SOBEL
Counsel of Record

MARY C. GORDON
LAW OFFICE OF CAROL A. SOBEL

REBECCA F. THORNTON
LAW OFFICE OF REBECCA F. THORNTON

429 Santa Monica Boulevard
Suite 550
Santa Monica, California 90401
Tel. (310) 393-3055

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether a law requiring a permit for expressive activity on private and public property based solely on speculation as to whether the event may have an "impact" on public property or "may" require unspecified city services beyond those normally associated with the property is a valid time, place or manner regulation.

II. Whether Petitioner's adoption of an administrative regulation limiting the types of City services that may invoke a permit requirement for smaller events on private or public property moots Petitioner's claims for review on certiorari.

III. Whether a law vesting unbridled discretion to waive fees and charges for expressive activity in traditional public fora is a valid time, place or manner regulation where the record evinces capricious application of the provision.

IV. Whether an ordinance that authorizes officials to impose unspecified conditions on all "spontaneous" expressive activity and requires advance notice, even where the event would not otherwise be subject to the City's permitting scheme, provides ample alternative means of communication.

V. Whether a City may condition a permit for core expressive activity in public fora on a requirement to indemnify the City against all harm resulting from the activity, regardless of whether it is caused by the

QUESTION PRESENTED – Continued

permittee's acts or omissions, third parties not under the permittee's direction or control, or negligent and intentional wrongful acts of police or other City employees.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent Long Beach Area Peace Network is an unincorporated association. Respondent Mann is an individual. Neither has a relationship to any corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF APPENDICES iv

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. THE DECISION BY THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OR ANY CIRCUIT REVIEWING REASONABLE TIME, PLACE AND MANNER REGULATIONS OF EXPRESSIVE ACTIVITY IN ALL PUBLIC FORA IN THE CITY 8

A. No Conflict Exists Between the Ninth Circuit's Decision Voiding Only the Catch-All Third Category of "Special Events" and the Decisions of This Court's or Other Circuits' Precedents 9

1. Petitioner's amended administrative regulation, listing City services that may require a permit under the third category of special events, moots Petitioner's claim 11

2. Litter abatement is not a substantial government interest requiring a permit for expressive activity 13

TABLE OF CONTENTS – Continued

Page

B. The Ninth Circuit Applied Well-Established Precedents to Hold the "Spontaneous" Speech Provision Did Not Provide Ample Alternatives for Communication on Timely Issues..... 16

C. No Conflict Exists Between the Decision in *Peace Network* and the Decision of This Court or Any Circuit Concerning the "Indemnification" Provision Held Unconstitutional in This Case..... 19

D. No Conflict Exists Between the Decisions of This Court or Any Circuit Regarding the Standardless Waiver Provision Invalidated By the Ninth Circuit in *Peace Network*..... 23

II. CONCLUSION..... 28

TABLE OF APPENDICES

Long Beach Administrative Regulation AR 8-28 Issue 2.....App. 1

TABLE OF AUTHORITIES

Page

CASES:

ACLU of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003) 15

American-Arab Anti-Discrimination Committee v. Dearborn, 418 F.3d 600 (6th Cir. 2005) 7, 10, 11, 26

Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009) (en banc) 4, 5

CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006) 26

Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) 16

City of Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988) 18, 27

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 6, 19

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 12

Cox v. New Hampshire, 312 U.S. 569 (1941) 6, 19, 24

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 12, 19, 20, 24, 27

Heffron v. International Soc. For Krishna Consciousness, 452 U.S. 640 (1981) 15

Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 12

Horina v. The City of Granite City, 538 F.3d 624 (7th Cir. 2008) 15

TABLE OF AUTHORITIES – Continued

Page

Jacobson v. Harris, 869 F.2d 1172 (8th Cir. 1989) 22

Jews for Jesus, Inc. v. MBTA, 984 F.2d 1319 (1st Cir. 1993) 14

Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998) 15

Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010 (2008), *amended* 574 F.3d 1011 (9th Cir. 2009) ..... *passim*

Martin v. Struthers, 319 U.S. 141 (1943) 14

NAACP v. City of Richmond, 743 F.2d 1343 (9th Cir. 1985) 16, 17

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 21, 22

Nationalist Movement v. City of York, 481 F.3d 178 (3rd Cir. 2007) 22

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 11

Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997) 10

Orin v. Barclay, 272 F.3d 1207 (9th Cir. 1991) 20, 21

Paulsen v. Gotbaum, 982 F.2d 825 (2nd Cir. 1992) 15

Parks v. Finan, 385 F.3d 694 (6th Cir. 2004) 23, 25, 26, 27

Perry v. Sinderman, 408 U.S. 593 (1972) 20

TABLE OF AUTHORITIES – Continued

Page

Poulos v. New Hampshire, 345 U.S. 395 (1953) 6, 17

Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006) .....*passim*

Schneider v. New Jersey, 308 U.S. 147 (1939).....14, 15

Shuttlesworth v. City of Birmingham, Alabama, 394 U.S. 147 (1969).....16

Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128 (9th Cir. 2004).....*passim*

Thomas v. Chicago Park District, 534 U.S. 316 (2002).....*passim*

CONSTITUTION

U.S. Const. amend. I 11, 13, 21, 24, 25

LONG BEACH MUNICIPAL CODE

LBMC § 5.60 5

LBMC § 5.60.010(I)(1) 9

LBMC § 5.60.010(I)(2) 9

LBMC § 5.60.010(I)(3) 10, 14

LBMC § 5.60.020(D)(1).....14

LBMC § 5.60.020(D)(3).....14

LBMC § 5.60.020(D)(5).....14

LBMC § 5.60.020(D)(6).....14

LBMC § 5.60.020(D)(8).....14

TABLE OF AUTHORITIES – Continued

Page

LBMC § 5.60.020(E) 14
LBMC § 5.60.030(A)(5).....2
LBMC § 5.60.030(B) 17
LBMC § 5.60.050(A) 8
LBMC § 5.60.080 19
LBMC § 5.60.090 28

STATEMENT OF THE CASE

Respondents refer to the Ninth Circuit's description of the relevant facts in this matter. Specifically, the Ninth Circuit found that the Long Beach Area Peace Network ("Peace Network") is "'an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance.'" *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1015 (9th Cir. 2008). On February 15, 2003, prior to the start of the Iraq War, the Peace Network conducted a protest march and rally. *Id.* at 1016. Dr. Eugene Ruyle, on behalf of the group, filed an application for a "special event" permit, as required by the Long Beach Municipal Code ("LBMC"). *Id.* at 1015-16.

The march was held on public streets on the route required by the City. Several elected officials, including a City Council member, participated in the rally. *Id.* at 1016.

To obtain the permit, Dr. Ruyle was required to sign an agreement to "hold the City harmless from any liability caused by the conduct of the event"; that the "City will not be liable for any mishaps or injuries associated with the event"; and that "[f]ull responsibility for activities at the event will be assumed by [the LBAPN]." *Id.* (edits in original). After filing the application, Ruyle wrote to the City, seeking a waiver of the permit application fee as well as the departmental services charges. No fee or service charges were assessed for the February event. *Id.*

One month later, on March 22, 2003, in anticipation of the start of the bombing of Baghdad, the Peace Network scheduled another march and rally. Ruyle had submitted a request for this event on March 18, 2003, seeking a permit for the march and rally as a "spontaneous" event, which is defined in the LBMC as being "'occasioned by news or affairs coming into public knowledge within five (5) days of the event.'" 522 F.3d at 1016, *citing* LBMC § 5.60.030(A)(5). Ruyle estimated the event would be twice the size of the February 2003 march and rally, which involved 1,000 to 1,500 participants. *Id.*

The City approved the request, calculating charges for the event at $7,041, to be paid in four installments. Ruyle and other Peace Network members signed the agreement as individuals, adding a handwritten notation that they reserved the right to challenge the charges. *Id.* Ruyle paid the first installment of the charges to obtain the permit; however, the City misplaced the check. *Id.* at 1017.

Approximately 1,000 people participated in the March 2003 event, but no elected officials were involved. *Id.* During the march, members of the Surfrider Foundation briefly stood their surfboards in the sand to form the shape of a peace symbol as the marchers crossed on an overpass above the beach. "The display took place entirely on the beach, did not

interfere with any vehicular or pedestrian traffic, and did not result in any damage to the beach." *Id.*

After the March 2003 event, Ruyle wrote to the City, asking for a waiver of the charges, as he had done after the February event. 522 F.3d at 1017. City officials gave Ruyle "'no other guidelines than simply to write the letter to ask for a waiver.'" *Id.*

Without explanation, the City declined to waive charges for the March 2003 event and then requested payment for the remainder of the $7,041 estimated charges, now including $1,500 for use of the beach for the surfboard peace symbol display. *Id.* When the permittees did not pay, the City sued them in state court and obtained a judgment for $5,901.[1] The state court disallowed the charge for the surfboard display as it was "'not sufficiently justified as to actual costs'" and "'an improper restraint of expression.'" *Id.* at 1016.

The Ninth Circuit found evidence of "content-based favoritism" in the provision vesting unbridled discretion in the City Council to grant or deny waivers of fees and charges. *Id.* at 1043. The Ninth Circuit noted that the precise vice inherent in the LBMC's standardless waiver provision was evinced by the City's unexplained treatment of the waiver requests in the 2003 events, just one month apart,

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[1] Petitioner erroneously states that this action was brought against the Peace Network. Petitioner sued only the five individuals who had signed the permit. 522 F.3d at 1018.

with elected officials participating in the first, but not the second protest after the Iraq War began. 522 F.3d at 1043.

REASONS FOR DENYING THE PETITION

No conflict exists between the decision in *Long Beach Area Peace Network* and the precedents of this Court or the decisions of any other Circuit. Petition at pp. 9-13. The Ninth Circuit applied the correct legal principles to analyze Petitioner's parade and assembly ordinance and its decision is completely consistent with this Court's holdings and those of every other Circuit to consider similar claims.

Petitioner's argument depends upon shifting focus from this case and arguing that *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), departed from this Court's precedents and was wrongly decided, as urged by the dissent in *Berger*. Petition at p. 10. This is not the *Berger* case. While both *Berger* and *Long Beach Area Peace Network* involve First Amendment issues, the similarity ends there.

Peace Network addresses an ordinance regulating parades, assemblies and other "organized assemblages" in all public fora in Long Beach. *Berger*, on the other hand, involves regulations aimed at combatting "aggressive solicitation" by street performers at one specific forum, the Seattle Center, by requiring a "permit and badge" for street performers and restricting the performers' access to areas where

"captive audiences" wait to get into various facilities at the Seattle Center. 569 F.3d at 1034-35. None of these issues are raised in *Peace Network*, making *Berger* completely inapt.

In *Peace Network*, the Ninth Circuit affirmed Petitioner's right to regulate expressive activity in traditional public fora through narrowly-tailored laws and rejected five challenges by Respondents to the ordinance, but found that Petitioner had not met its burden as to four other provisions in the ordinance. *Peace Network*, 522 F.3d at 1015. The only sections of LBMC § 5.60 invalidated were the catch-all third category of "any other" special event, the illusory permitting exemption for "spontaneous" expression, the sweeping "hold-harmless" provision, and the unbridled discretion given to City Council members to waive fees and departmental charges. *Id.*

Throughout the course of this litigation, Petitioner has unsuccessfully advanced a shifting series of arguments. In its supplemental briefing to the Ninth Circuit prior to the argument before the panel and in its petition for rehearing, Petitioner urged that its ordinance was identical to those in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) and *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128 (9th Cir. 2004), in which the Ninth Circuit applied *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) to reject challenges to the constitutionality of special events permit schemes. The Ninth Circuit correctly rejected Petitioner's comparison.

Having failed to convince even a single judge of the Ninth Circuit to vote for rehearing or en banc review in this matter, Petitioner now abandons the argument that its ordinance mirrors the ones upheld in *Santa Monica Food Not Bombs* and *Southern Oregon Barter Fair*. Instead, Petitioner now argues that the Ninth Circuit's decision conflicts with this Court's holdings in *Thomas, supra*; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); and *Poulos v. New Hampshire*, 345 U.S. 395 (1953). There is no conflict between *Peace Network* and any Supreme Court case.

Petitioner also attempts to mislead the Court by misstating the factual record[2] and by claiming that its ordinance says something it does not. Through extensive use of ellipsis, Petitioner has drastically edited its "hold-harmless" provision to suggest a far narrower scope than the actual language creates.[3]

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[2] Petitioner asserts that the February 2003 march took place on a sidewalk, which is why it incurred no charges. Petition at p. 6. Petitioner also states that no charges would have been assessed for the March 2003 event if Respondents had agreed to march in the bike path. Petition at p. 7. Both statements are false. The February march took place in the street. Appellants' Excerpt of Record in the Court below ("AER") 5 [Ruyle Dec. at ¶4]. The March 2003 event written cost estimate provided to Respondents for using the bike path was only slightly less than for use of the street, estimated at $2,396 and $3,764 respectively. AER 14.

[3] *See* Petition for Certiorari at p. 4.

App. 213-15. This excision is not an authoritative construction limiting the scope of the provision.

Petitioner also misstates the Ninth Circuit's ruling on the LBMC categories of Special Events. The Ninth Circuit did *not* suggest that Petitioner could not impose reasonable time, place and manner regulations on large special events in the City. To the contrary, *Peace Network* affirmed the constitutionality of Petitioner's two main categories of special events, but found the third catch-all category unconstitutional because it was not restricted to assemblies on public property and it required a permit for events based upon some vague conjecture about possible "impact" on public property and potential impact on unidentified and undefined public services which did not advance Petitioner's public safety interests. *Peace Network*, 522 F.3d at 1033-36. This decision is fully consistent with the Sixth Circuit's decision in *American-Arab Anti-Discrimination Committee v. Dearborn*, 418 F.3d 600, 614 (6th Cir. 2005).

Petitioner also misstates the decision of the Ninth Circuit and argues that *Peace Network* held that a City could not require permittees to indemnify the City for parades and assemblies. Petition at pp. 34, 39. To the contrary, the Ninth Circuit expressly upheld indemnification but, nonetheless, found Petitioner's specific provision unprecedented in its scope because it made permittees responsible not only for harm caused by their own acts and omissions, but also for intentional or negligent acts against the permittee and others by police and other

city employees, and for the acts of third parties not under the control of the permittee.

Lastly, *Peace Network* correctly held that the provision authorizing any City Council member to waive all fees and costs for a special event lacked any standards and was not narrowly tailored. LBMC § 5.60.050(A). Without any guidelines cabining the official's discretion, and with evidence in the record showing that Respondents had been granted and denied waivers of fees and charges for anti-war protests, while other activists received waivers for a "peacefest," all without explanation, this provision is impermissibly vague.

In holding these four provisions of the ordinance unconstitutional, the Ninth Circuit followed the precedents of this Court and the resulting opinion is consistent with this Court's decisional law and that of other Circuits.

I. THE DECISION BY THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OR ANY CIRCUIT REVIEWING REASONABLE TIME, PLACE AND MANNER REGULATIONS OF EXPRESSIVE ACTIVITY IN ALL PUBLIC FORA IN THE CITY

This Court has instructed that content-neutral laws are constitutional only if they do not delegate overly broad permitting discretion to a public official, are narrowly tailored to serve a significant government

interest, and leave open ample alternatives for communication of information, but "even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas*, 534 U.S. at 323. *Id.* To pass constitutional muster, an ordinance must contain "'narrowly drawn, reasonable and definite standards' that are 'reasonably specific and objective, and do not leave the decision to the whim of the administrator.'" *Id.* at 324. The LBMC fails these requirements.

A. No Conflict Exists Between the Ninth Circuit's Decision Voiding Only the Catch-All Third Category of "Special Events" and the Decisions of This Court's or Other Circuits' Precedents

Petitioner's "Special Events" ordinance sets forth three categories of permit requirements. The first category requires a permit for any parade, procession, etc. on streets or sidewalks that does not comply with applicable traffic regulations. App. 190 (LBMC § 5.60.010(I)(1). The second category requires a permit for any "organized assemblage" of 75 or more persons at any "public place, property or facility" gathered for a "common purpose under the direction or control of a person." *Id.* § 5.60.010(I)(2). The third category requires a permit for "[a]ny other organized activity involving 75 or more persons conducted by a person for a common or collective use, purpose or benefit, which involves the use of, or *has an impact on*, public property or facilities and which *may* require

the provision of city public services in response thereto." App. 194 § 5.60.010(I)(3) (emphasis supplied).[4]

Petitioner is not without the authority to regulate large "special events" in the City. Only the third category of "special event" was held unconstitutional in *Peace Network*. An event that will interfere with traffic requires a permit under the first category. Any "organized assemblage" of 75 or more persons in a public place requires a permit under the second category. But the third category is obtuse.

There is no dispute that Petitioner has a compelling interest in requiring a permit for events based on public safety concerns, including traffic regulation, street closures and street barriers. *Peace Network*, 522 F.3d at 1036. "Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties. . . ." *Thomas*, 534 U.S. at 323 (internal quotation marks and citation omitted). Beyond these well-recognized interests, as the Sixth Circuit recently agreed, requiring a permit based solely on speculation about the need for other unspecified city services is "unconstitutionally vague because it offers no guidance to citizens regarding when they would be required to apply for a permit." *American-Arab Anti-Discrimination*

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[4] The Ninth Circuit found the distinction between the second and third categories barely discernible. 522 F.3d at 1034. The third category is largely, if not entirely, subsumed in the second category and is therefore surplusage. *Nunez v. City of San Diego*, 114 F.3d 935, 941 (9th Cir. 1997).

Committee v. Dearborn, 418 F.3d 600, 614 (6th Cir. 2005). Unsupported conjecture may not form the basis for First Amendment restrictions. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). For this reason, as in *Dearborn*, the Ninth Circuit correctly held that the third category of special event is "not narrowly tailored to serve a substantial governmental interest." 522 F.3d at 1036.

1. Petitioner's amended administrative regulation, listing City services that may require a permit under the third category of special events, moots Petitioner's claim

In the course of this litigation, Petitioner has twice enacted an administrative regulation listing the public services which might necessitate a permit for the third category of special events on public or private property. The first administrative regulation was adopted just one week before oral argument. It identified six categories of activity "likely to require the provision of city services": street blockage, erecting barriers, construction, traffic control, crowd control "and/or . . . litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." App. 224. This was the first time that "litter abatement" was at issue in this litigation.

The Ninth Circuit correctly held that only the services for traffic control, street closures and

erecting barriers furthered the government's compelling interest in public safety. To the extent the administrative regulation authorized litter abatement, crowd control and construction as separate and independent bases to require a permit, the Ninth Circuit held that the regulation was not narrowly tailored and did not cure the constitutional deficiencies in this provision.

On remand from the Ninth Circuit, Petitioner amended the administrative regulation to limit the consideration of "impact" on public services to street blockage, erecting barriers and/or traffic control. App. 1-2 (AR 8-28). Litter abatement is no longer a basis for requiring a permit for expressive activity under Petitioner's third category of Special Events.

A court will review only the current version of an ordinance, including any newly adopted administrative regulations construing the law. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("a federal court must . . . consider any limiting construction that . . . [an] enforcement agency has proffered.") (edits supplied). *See also Forsyth County v. Nationalist Movement,* 505 U.S. 123, 131 (1992). A previously viable claim will be mooted by recently promulgated administrative regulations. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citation omitted). *See also Santa Monica Food Not Bombs*, 450 F.3d at 1035.

Petitioner's amended regulation moots its argument on this claim since it eliminates all but the three justifications that the Ninth Circuit held advanced Petitioner's compelling interest in public safety and supported requiring an advance permit. *Peace Network*, 522 F.3d at 1035-36.

2. Litter abatement is not a substantial government interest requiring a permit for expressive activity

Petitioner contends that it has an interest in recouping financially for litter caused by large events on public property. In support of this argument, Petitioner cites to examples such as the Long Beach City Marathon and the Toyota Grand Prix, involving thousands of people at each event.[5] Petition at p. 18. Most certainly, these events are included within the first two categories of special events as both the Marathon and the Grand Prix would require closure of streets for the events and involve well more than 75 people. In these categories, Petitioner may recoup a myriad of costs for these events, including City expenses for clean-up, and may impose conditions on

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[5] A permit requirement solely to recoup the costs of litter abatement impacts an auto race far differently from the burden it places on a protest of a Town Hall meeting with the president or other elected officials on health care, for example. There are marginal, if any, First Amendment interests in the Grand Prix.

construction of structures used in such "special events."[6]

Seventy years ago, this Court held that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). *See also*, *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("minor nuisance of cleaning litter from the streets"). The City has the power to punish those who toss leaflets on the ground, as opposed to those who hand them out. *Schneider*, 308 U.S. at 162-63. *Accord*, *Jews for Jesus*,

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[6] Under the LBMC, Petitioner may recoup the cost of litter abatement, construction and crowd control at large events. LBMC § 5.60.020(D)(6) allows a cleaning deposit for events that include structures, display or use horses, food or beverage distribution or sales or the sale of goods or services. LBMC § 5.60.020(D)(8) allows a permit to be conditioned on a having a waste management plan, and clean up and restoration of the event site. LBMC § 5.60.020(E) permits reimbursement for charges the City incurs for City services. LBMC § 5.60.020(D)(3) authorizes Petitioner to impose reasonable requirements for "structures to be displayed or used in the event." LBMC § 5.60.020(D)(5) allows the City to impose conditions on structures used in the special event. LBMC § 5.060.020(D)(1) addresses crowd control by requiring, *inter alia*, assembly or disbanding area for a parade or like event, and LBMC § 5.60.020(D)(3) authorizes permit conditions designed to avoid or lessen interference with public safety functions and/or emergency services access. App. 196-97. None of these provisions were invalidated by the Ninth Circuit, so Petitioner has an arsenal of tools it may use apart from the vague provisions of LBMC § 5.60.010(I)(3).

Inc. v. MBTA, 984 F.2d 1319, 1324 (1st Cir. 1993). No decision of this Court or any Circuit is in conflict with the Ninth Circuit's ruling on this issue.[7] *See Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998). Standing alone, Petitioner's interest in prevention of littering is insufficient to justify requiring a permit to engage in expressive activity under the third category of special events. *See ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir. 2003).

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[7] Petitioner contends that *Horina v. The City of Granite City*, 538 F.3d 624 (7th Cir. 2008), establishes that litter abatement is a substantial government interest. Petition at p. 19. In fact, *Horina* invalidated a law regulating handbill distribution because it found that the City had not shown it furthered a substantial government interest. *Id.* at 634. Petitioner also argues that *Peace Network* conflicts with *Paulsen v. Gotbaum*, 982 F.2d 825 (2nd Cir. 1992). Petition at p. 18. *Paulsen* upheld a rule that "restrict[ed] soliciting or leafletting [to a stationary area] only during special events, when the large crowds may cause congestion and create more litter." *Id.* at 829 (bracketed edit supplied). *Paulsen* applied *Heffron v. International Soc. For Krishna Consciousness*, 452 U.S. 640 (1981), a case with no relevance to Petitioner's parade and assembly ordinance. Understandably, *Paulsen* does not discuss *Schneider* because the ordinance in *Paulsen* only restricted the location of leafletting at large events and did not impose a financial burden on leafletters to recoup the costs of litter abatement.

B. The Ninth Circuit Applied Well-Established Precedents to Hold the "Spontaneous" Speech Provision Did Not Provide Ample Alternatives for Communication on Timely Issues

The Ninth Circuit correctly held that the "spontaneous events" provision in the Long Beach ordinance was unconstitutional because it was not narrowly tailored and applied to both public and private properties "where there is no threat of disruption of the flow of pedestrian or vehicular traffic," undermining the City's interest in requiring advance notice. 522 F.3d at 1037-38.

Both this Court and the Ninth Circuit have repeatedly held that, an ordinance regulating expressive activity must allow ample alternatives for "spontaneous" response to "'late breaking events'," 522 F.3d at 1036, citing *Santa Monica Food Not Bombs*, 450 F.3d at 1047. Otherwise "'[i]mmediate speech can no longer respond to immediate issues.'" 522 F.3d at 1037, citing *NAACP v. City of Richmond*, 743 F.2d 1343, 1355 (9th Cir. 1985). "[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Id.*, citing *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 163 (1969). *See also Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) ("delay 'of even a day or two' may be intolerable when applied to 'political' speech in which the element of timeliness may be important"). In Long Beach, "'the quantity of

effective speech is limited.'" 522 F.3d at 1038, citing *City of Richmond*, 743 F.2d at 1356.[8]

In *Food Not Bombs*, the Ninth Circuit upheld a "spontaneous" speech exemption that allowed large assemblies without notice to the City at any time on the lawn of City Hall. 450 F.3d at 1048. Santa Monica's ordinance also provided a "safe harbor" for expressive activity on sidewalks and park paths as a second alternative for groups as large as 2,000 persons. *Id.* Santa Monica required advance notice for "organized" events only and "exempted 'unorganized' gatherings" entirely from permits for "spontaneous" events. *Peace Network*, 574 F.3d at 1037, citing *Food Not Bombs*, 450 F.3d at 1049. Moreover, during the course of that litigation, the Santa Monica ordinance was amended to allow notice for larger spontaneous events to be given to the police department at any time when the city manager's office was not open to prevent critical time delays caused by holidays and weekends. *Id.*

There are no similarly ample alternatives for spontaneous expressive activity in Long Beach. LBMC § 5.60.030(B) exempts spontaneous expressive activities from the special events permitting requirements but then expressly authorizes the city manager

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[8] To the extent that Petitioner argues that *Poulus*, 345 U.S. 395, limits the ability of Respondents and others to engage in spontaneous expressive activity wherever one wants, that is not an issue here. Petitioner has the authority to impose reasonable time, place and manner regulations, but has not done so.

to impose conditions, without identifying what they may be, on all "spontaneous parades, assemblies or demonstrations . . . *whether or not* said activities are governed by the permit requirements set forth in this chapter." App. 210-11 (emphasis and edits supplied). This provision swallows the purported exemption for "spontaneous" speech.

A law requiring permission to engage in expressive activity is a prior restraint on speech. *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 755 (1988). Petitioner requires notice, reserves the right to deny permission and to impose conditions on all "spontaneous" speech in the City. This provision is not narrowly tailored and burdens far more speech than necessary because it imposes heavier burdens on expressive activity simply because it is "spontaneous." No substantial government interest is furthered by this regulation since, but for the "spontaneous" nature of the speech, a similar activity would not generate a permit requirement based on the government's interests in maintaining public safety and regulating competing uses of public fora.

Petitioner's ordinance also expressly requires 24-hours advance notice to the city manager for *all* spontaneous "assemblies." The concept of a "safe harbor" in Long Beach similar to the one in *Food Not Bombs* is wholly illusory. Thus "spontaneous" expression may be more heavily burdened than planned assemblies in Long Beach at the unfettered whim of City officials.

C. No Conflict Exists Between the Decision in *Peace Network* and the Decision of This Court or Any Circuit Concerning the "Indemnification" Provision Held Unconstitutional in This Case

The Ninth Circuit expressly upheld Petitioner's ability to require indemnification, including an insurance requirement, but invalidated the specific provision in the LBMC imposing unprecedented sweeping and absolutely liability for any and all harm and damages resulting from protected expressive activity. 522 F.3d at 1037-40. Petitioner contends that in so holding, the Ninth Circuit took this Court's decision in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), "out of context" and ran afoul of the Court's decisions in *Thomas*, as well as *Cox*, 312 U.S. 569 and *Clark*, 468 U.S. 288.[9] Petition for Rehearing at pp. 7-8. Petitioner further contends that the Circuit cited no authority for its holding. *Id.* at p. 9. On both contentions the City is wrong.

First, as the Ninth Circuit noted, to obtain a permit the individual or organization must sign an application that contains a "hold-harmless" provision far broader than the Code provision. App. 214-15 (LBMC § 5.60.080). This application requires a permittee to hold the City harmless "from *any liability*

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[9] Petitioner has now abandoned the argument made in its petition for rehearing that the Ninth Circuit's ruling on this issue conflicted with the Circuit's decision in *Food Not Bombs*.

caused by the conduct of the event." 522 F.3d at 1039 (emphasis in original). The court correctly held that "the phrase 'any liability caused by the conduct of the event,' is susceptible to a broad reading, encompassing liability caused by the acts or omissions of any person or entity involved in the event, including acts and omissions not only of the permittees but also of the City and third parties." *Id.*

The Ninth Circuit correctly found that Petitioner's indemnification provision is not narrowly tailored to serve a substantial government interest for three reasons, each of which is independently sufficient to hold this provision unconstitutional. First, the sweeping scope of the "hold-harmless" agreement violates the bedrock principle that "governments may not 'recoup costs that are related to listeners' reaction' to speech." *Id.* at 1040, citing *Forsyth County*, 505 U.S. at 135 n.12. Petitioner's "indemnification and hold-harmless clauses contain no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity," impermissibly allowing the City to pass such charges on to the permittee if their event provokes a hostile reaction. *Id.* The "government may not 'produce a result which [it] could not command directly.' [Citation.]" *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Second, the "hold-harmless" agreement extinguishes the right of a permittee to vindicate constitutional rights violations committed by the City during the expressive activity. 522 F.3d at 1040, citing *Orin v. Barclay*, 272 F.3d 1207, 1216 (9th Cir. 1991).

If the government would not be entitled to qualified immunity for violating the constitutional rights of a speaker, it certainly could not require the speaker to waive fundamental rights as a condition of obtaining a permit in the first place. *Id.*

Third, the hold-harmless provision "requires permittees to assume legal and financial responsibility for even those 'activities at the event' that are outside the control of the permittee, indeed including activities of the City.[10] *Id.*

The Ninth Circuit measured Petitioner's indemnification provision against the First Amendment limits on tort liability announced in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a case which Petitioner does not even address. *Claiborne Hardware* established that "'[t]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages[.]'" *Peace Network*, 574 F.3d at 1040, citing 458 U.S. at 916-17. Liability may not be imposed "'merely because an individual belonged to a group, some members of which committed acts of

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[10] The contract permittees must sign underscores the expanse of this provision. The Application for a Permit requires an individual to agree that "[an] organization will hold the City harmless from any liability caused by the conduct of the event. Full responsibility for activities at the event will be assumed by the organization." Petitioner's Excerpt of Record in the Court below ("ER") 38.

violence.'" *Id.* at 1041, citing 458 U.S. at 920. Adhering to this principle, the Ninth Circuit correctly held that Petitioner's indemnification provisions would penalize "substantially more speech than the liability found unconstitutional in *Claiborne Hardware*." *Id.*

The Long Beach indemnification provisions are also far broader than those upheld by the Ninth Circuit in *Food Not Bombs*, which limited liability to the "alleged willful or negligent acts or omissions of permittee, its officers, agents or employees in connection with the permitted event or activity." *Id.*, citing *Food Not Bombs*, 450 F.3d at 1056 n.10 (internal quotation marks omitted in original). Petitioner contends, however, that *Peace Network* conflicts with the decisions of the Third Circuit in *Nationalist Movement v. City of York*, 481 F.3d 178 (3rd Cir. 2007), and the Eighth Circuit in *Jacobson v. Harris,* 869 F.2d 1172 (8th Cir. 1989). Petitioner is wrong on both counts. The indemnification provision in *Nationalist Movement* was limited by its explicit terms to liability for "'any damage or injury occurring in connection with the permitted event *proximately caused by the action*' of the speaker." 481 F.3d at 186 n.9. This is the type of narrow-tailoring absent in this case. Similarly, *Jacobson*, a case involving an insurance requirement indemnifying a city against injuries resulting from the placement of newsracks

on city property, does not present a conflict with the hold-harmless provision at issue here.

In an attempt to narrow its ordinance, Petitioner has engaged in heavy editing of the actual language, taking out whole phrases and key words. Petition at p. 4. If Petitioner wants to amend its ordinance to incorporate these edits it may, but these redactions do not constitute an authoritative construction of the ordinance and, thus, do nothing to limit the unconstitutional breadth of this provision.

D. No Conflict Exists Between the Decisions of This Court or Any Circuit Regarding the Standardless Waiver Provision Invalidated By the Ninth Circuit in *Peace Network*

In its petition for rehearing, the government contended that the Ninth Circuit's ruling on the unconstitutionality of the waiver provision conflicted with the Circuit's decision in *Southern Oregon Barter Fair*, 372 F.3d 1128, the Supreme Court's decision in *Thomas* and the decision of the Sixth Circuit in *Parks v. Finan*, 385 F.3d 694, 699-700 (6th Cir. 2004), which relied on *Thomas* to uphold a provision virtually identical to the waiver at issue in *Thomas*. Petition at pp. 12-13. Now, Petitioner has abandoned the argument that a conflict exists with *Southern Oregon Barter Fair*, focusing solely on *Parks*.

In *Southern Oregon Barter Fair,* the Ninth Circuit underscored that the government may charge

fees to administer a permit scheme. 372 F.3d at 1139, citing *Cox*, 312 U.S. at 577.[11] At the same time, the Ninth Circuit reiterated this Court's instruction that "[t]his principle is subject to an important limitation: the regulation must provide objective standards that do not leave the amount of the fee to the whim of the official, enabling the official to favor some speakers and suppress others." *Id.*, citing *Forsyth County*, 505 U.S. at 130-33. "[A] time, place, and manner regulation must 'contain adequate standards to guide the official's discretion and render it subject to effective judicial review.'" *Id.*, citing *Thomas*, 534 U.S. at 323 (citation omitted in original). The Ninth Circuit correctly applied these same principles to the waiver provision in *Peace Network*. 522 F.3d at 1042. No standards exist in this instance to guide implementation of Petitioner's waiver provision.

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[11] Petitioner contends that "[t]his case epitomizes the difficulty courts have in balancing the countervailing First Amendment interests expressed in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), against the legitimate governmental interests expressed in *Cox v. New Hampshire*, 312 U.S. 569 (1941)." Petition at p. 13. Yet, this Court in *Forsyth* readily distinguished *Cox*, noting that "[u]nlike this case, there was in *Cox* no testimony or evidence that the statute granted unfettered discretion to the licensing authority." 505 U.S. at 133 n.11, 136-37. The same distinction exists here, where the Ninth Circuit expressly recognized *Cox* in finding that the overall permitting scheme here was a reasonable time, place and manner regulation, 522 F.3d at 1027, as it did in finding the unbridled discretion to grant or deny fee and cost waivers unconstitutional. *Id.* at 1042.

Petitioner contends that the decision in *Peace Network* conflicts with this Court's holding in *Thomas* for two reasons. First, Petitioner argues that a law may be invalidated based on the vice of "unbridled discretion" only when it creates an "absolute prohibition" on First Amendment activities. Petition at p. 24. Tellingly, Petitioner does not cite to any specific language in *Thomas* to support this sweeping proposition.

Rather, Petitioner improperly conflates this argument with its claim that the Ninth Circuit did not follow *Thomas*' instruction that a waiver provision "furthers, rather than constricts, free speech." *Thomas,* 523 U.S. at 325. This Court described the waiver in *Thomas* as expanding the opportunity for speech because it permitted officials to ignore the failure "to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid." *Id.* at 325. The waiver provision here does not affect mere "technicalities." As the record evinces, this provision allows a single City Council member to waive substantial charges for core political speech in archetypal public fora. This is no mere "technicality" to be remedied.

Contrary to Petitioner's assertion, neither this Court nor the Sixth Circuit in *Parks*, relying on *Thomas,* holds that *Thomas* created a categorical restriction on voiding all or part of a permitting scheme that vested public officials with the unrestricted authority to "waive" key provisions. *Parks* held, as

did the Ninth Circuit in *Southern Oregon Barter Fair*, that "[w]hen a permitting authority uses waivers to promote preferred speakers or to inhibit disfavored speakers, a court may invalidate the waiver scheme." 372 F.3d at 700, citing *Thomas* at 325.

In fact, after *Parks*, the Sixth Circuit invalidated a provision vesting City officials with unbridled discretion to waive advance permit requirements to engage in core expressive activities on streets and sidewalks. *American-Arab Anti-Discrimination Committee*, 418 F.3d 600. Petitioner's ordinance suffers from the same constitutional flaws.

> The City points to this practice of granting waivers as a means of saving the Ordinance from a lack of narrow tailoring. . . . [T]he City points to no provision in the Ordinance, past practice, or narrowing construction that specifies standards by which it makes its waiver decisions. While we embrace the broad latitude and flexibility extended to waiver schemes generally, *Parks*[, *supra*, at p.700], the city of Dearborn's "unwritten policy of waiving the permit requirement" is "opaque," and lacking in sufficient notice and standards to guide city officials. [Citations.]

418 F.3d at 607. *See also CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) (invalidating fee waiver provision that lacked "objective standards" to prevent discriminatory application).

Petitioner's reliance on *Parks* to suggest a conflict among the Circuits is misplaced for a second reason. In *Parks*, the plaintiff "produced no evidence that [the permitting agency] used its discretion to grant waivers to preferred speakers, or deny waivers to disfavored speakers." *Id.* at 700. By contrast, ample evidence here evinces that the unbridled discretion inherent in Petitioner's waiver provision has been used capriciously to impose a substantial financial burden on Respondents.

This Court has repeatedly instructed that courts should look to any regulations or other authoritative statements of the scope of a challenged regulation. The Ninth Circuit has consistently applied this rule, noting that it is "common to consider a city's authoritative interpretation of its guidelines and ordinances." *Food Not Bombs*, 450 F.3d at 1035, citing among other authorities, *Forsyth County*, 505 U.S. at 131 ("In evaluating [a] facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it.").

"To affect the constitutional analysis, such a limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" 450 F.3d at 1035, citing *City of Lakewood*, 486 U.S. at 770. Petitioner can point to "no provision of the Ordinance, or to any implementing regulation, that guides the City Council's decision whether to fund or waive fees and charges." *Peace Network*, 522 F.3d at 1042.

Without standards or guidelines, officials have uncabined authority to burden expressive events in the City. AER 30 (LBMC § 5.60.090 "Departmental service charges"). In this case, if Respondents had been willing to convey a message of "peace," rather than an "anti-war" message in 2004, no doubt they would have received a waiver of costs again. AER 6-7, ¶8. Most certainly, the waiver provision fails the test of a narrowly-tailored time, place and manner regulation because it lacks any standards or guidelines to prevent the arbitrary and capricious application of the provision that Respondents have suffered.

II. CONCLUSION

For all of the foregoing reasons, the decision in *Peace Network* presents no conflict with the precedents of this Court or the decision of any Circuit and

was correctly decided on the facts of this case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CAROL A. SOBEL
Counsel of Record

MARY C. GORDON
LAW OFFICE OF CAROL A. SOBEL

REBECCA F. THORNTON
LAW OFFICE OF
REBECCA F. THORNTON

429 Santa Monica Boulevard
Suite 550
Santa Monica, California 90401
Tel. (310) 393-3055

Attorneys for Respondents

Dated: December 28, 2009

[LOGO] ***City of Long Beach***

Administrative Regulation

(Filed Sep. 23, 2009)

Number AR 8-28, Issue 2
Effective: September 22, 2009

I. Purpose

The purpose of this regulation is to set forth policies and procedures governing the implementation of Long Beach Municipal Code Chapter 5.60 (Parades and Special Events).

II. Scope

This regulation is applicable to all City departments and offices responsible directly to the City Manager. Any and all existing administrative regulations in conflict with this regulation are hereby rescinded. It is also requested that elective and other independent offices and departments of the City comply with these procedures in the interest of administrative uniformity.

III. Amendment

The City Manager may amend the procedures and contents set forth in this regulation from time to time as appropriate.

IV. Policy

A. For the purpose of implementing Long Beach Municipal Code § 5.60.010(I)(3), an activity shall only be considered a special event if *both* of the following circumstances occur:

1. An organized activity involves seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities; and

2. The activity is likely to require the provision of city services for the purpose of:

   a. street blockage,

   b. erecting barriers, and/or

   c. traffic control,

V. *Authorized By:*

/s/ _____

Patrick H. West,
City Manager